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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

IN RE PAIRS AIR CRASH OF MARCH 3, 1974

PLAINTIFFS IN MDL 172
DORIS LEAH KALINSKY, et al.,

Petitioners,

vs.

GENERAL DYNAMICS CORPORATION;
McDONNELL DOUGLAS CORPORATION,

Respondents.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS AND AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS BY CALIFORNIA TRIAL LAWYERS ASSOCIATION

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The California Trial Lawyers Association (CTLA) hereby respectfully moves for leave to file the attached Brief Amicus Curiae in the instant case as provided for by Rule 33 of the rules of this Court. Pursuant to Rule 33.1, CTLA sent a letter to each counsel of record requesting the consent of that counsel to a filing of this Brief; of the ten counsel, plaintiffs Kalinsky have given their consent. Plaintiff Flanagan has settled her case.

The following have not consented to the filing of this Brief: defendants General Dynamics, McDonnell Douglas. We have had no response from the remaining parties at the time this brief is being printed.

INTEREST OF THE AMICUS CURIAE

CTLA is an organization of attorneys in California who represent primarily plaintiffs in personal injury and wrongful death cases. As in the instant case, many such cases involve injuries or deaths caused by defective products, as the airplane in the instant case is alleged to be. Of those, a certain proportion involve cases in which the defendants are alleged to have marketed a product known to be defective. Thus, the issues framed by the instant case are of vital interest to a class of plaintiffs in similar wrongful death actions in California and elsewhere. We are thus concerned not only with the outcome of the instant case, but with establishing as a matter of public policy that it is not cheaper to kill than to maim.

ISSUES TO BE COVERED

If just one victim of this aircrash had lived, he could request the assessment of punitive damages against the defendant manufacturer on the basis of intentional misconduct. We contend that it is a denial of equal protection of the laws[1/] to plaintiffs herein, who are just as much victims of the intentional misconduct as those who died, to refuse to allow those living victims to request such a remedy.

Particularly is this so when the goal of punitive damages - not compensation, not damages in the true sense, but in truth awarded as a penalty, an assessment against the defendants for the purpose of punishment and deterence of similar future misconduct - is considered.

1/ United States Constitution, 14th Amend., §1; California Constitution, Art. I, §7, subdivision (a); Cooper v. Bray, 21 Cal.3d 841, 148 Cal. Rptr. 148 (1978); Brown v. Merlo, 8 Cal.3d 855, 106 Cal.Rptr. 388 (1973); State Farm Mutual Ins. Co. v. Smith, ___ Cal.App.___(2nd Civil 58386, 80 Daily Journal D.A.R. 2393, Aug. 22, 1980).

CONCLUSION

Because the attached Brief covers issues of substantial public importance, affecting the safety literally of millions, this motion should be granted.

Respectfully submitted,

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BRIEF FOR THE CALIFORNIA TRIAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-PETITIONERS

The interest of the Amicus Curiae is described in the Motion for Leave to File this Brief, which is submitted herewith.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the instant case 346 human beings were killed in the disastrous crash of a Turkish Airlines DC10 in Paris, in 1974. Several thousand survivors were thus damaged in the loss of their loved ones.

Plaintiffs herein contend that the defendant manufacturer had actual knowledge that a critical component of the airplane would fail, and would fail in such a way that a disaster was a total certainty. Said parties also contend that the defendant manufacturer made a conscious, deliberate and knowing decision, a decision made with an eye only to corporate profits, to manufacture the airplane with the aforesaid defect, simply because the Wrongful Death statutes in approximately half the states purport to deny liability for punitive damages in wrongful death cases. Thus, plaintiffs contend that the defendant manufacturers decided it was cheaper to kill than to maim. As a matter of public policy and of fundamental justice, such a position cannot be upheld by this Court.

ARGUMENT

THE DETERENCE OF FUTURE WRONG DOING IS AN ABSOLUTE NECESSITY TO PREVENT A REPETITION OF THE MASSIVE LOSS OF LIFE WHICH OCCURRED IN THIS TRAGIC ACCIDENT.

Amicus submits that in considering the issues of this case, we should all pay heed to Shannon v. Samuel M. Langston Company, 379 Fed.Supp. 797 (W.D.Mich., 1974):

> "...the law cannot in justice grant corporations a greater ability to avoid liabilities than it grants to natural persons. Human beings are created in the image and likeness of God, Genesis I:27, and their fundamental rights inhere in them as creatures of the Creator. The inalienable right of a human being to life and freedom from a maimed body is inalienable, and of tremendous importance to the integrity of a democratic society." 379 Fed.Supp. at 803, emphasis added.

The Court of Appeals misconstrues who is the true victim in these death cases. (Opinion, page 4, line 9, and page 12, line 16). Obviously the decedents are victims. But so are the surviving children who have lost and continue to lose the love, support, guidance, and so forth which the decedents would have provided.

The Court of Appeals seems troubled. (Opinion, page 5, lines 18 through 22) that the plaintiffs in a wrongful death action such as this are acting as private attorneys general. But defective products are designed and built behind a wall of secrecy. There was no public input to the design process. No concerned member of the public participated in the decision to produce this airplane with a known defect. Thus, plaintiffs herein fulfill a needed social function by bringing these lawsuits before the Courts, so that the Courts can exercise their traditional role as the guardians of the public interest. The Courts are, in effect, the safety review Committee of last resort.

Traditionally courts have been especially sensitive to injuries caused by defective products. The defective product does not confront the victim one-on-one, as does the negligent or even reckless driver; whereas a victim of an auto collision might have a chance to take evasive action, the victim of the defective product is no better off than the victim of a time-bomb. Typically, defective products have their genesis in the design or manufacturing process.

Once the defect occurs, it is only a matter of time until injury - often disastrous - strikes:

> "...for example, if a drillpress is designed without a safety guard, there is little question that somewhere in the manufacturing community there will be a plaintiff who is destined to have his hand severed, due either to his negligence or to inadvertence... in essence, once a product with a designed defect is marketed, we know with substantial certainty that there will be a victim - we just do not know his name."
> Twerski, "The Use and Abuse of Comparative Negligence in Products Liability," 10 Indiana Law Review 797, 800 (1977) (emphasis added).

In other words, it is not a question of whether there will be an accident - only when.

There could be no better example of a time-bomb waiting to explode than the instant case. If the failure in the rear door was diagnosed in advance as not only failing but failing disastrously, the defendants herein, by their corporate expertise with statistics on: (1) the number of planes to be sold; (2) the number of flights to be taken by airlines; (3) the number of persons on those flights, and (4) the average value of death claims limited only to compensatory damages, could easily have made a conscious

deliberate decision to leave the defect the way it was, because it would be cheaper to kill than to maim. This, we submit, cannot be allowed to go unpunished. This, we contend, must not be allowed to happen again.

California courts, as well as most others which allow punitive damages, have given the rational for such damages as a necessary social mechanism to punish misconduct and to deter similar misconduct in the future. As the California Supreme Court stated in Johns-Manville Products Corporation v. Superior Court, 27 Cal. 3d, 465 (July 3, 1980) in allowing workers to sue civilly their employer for the intentional concealment of the effects of asbestos poisoning upon the employees:

> "Moreover, defendant's alleged actions ... are so egregious and the societal interest in deterring similar conduct in the future is so great, that there is justification for awarding punitive damages." 27 Cal. 3d at 478.

Numerous other California rulings allow such damages for the purpose of a deterrence and of punishment, such as Taylor v. Superior Court, 24 Cal. 3d 890 (1979); Agarwal v. Johnson, 25 Cal. 3d 932 (1979); Neal v. Farmers Insurance, 21 Cal. 3d 910 (1979); Wyatt v. Union Mortgage, 24 Cal. 3d 773 (1979); Egan v. Mutual of Omaha, 24 Cal. 3d 809 (1979); and Tameny v. Atlantic Richfield, 27 Cal. 3d 167 (1980).

In Gavica v. Hanson, 608 Pac.2d 861 (1980), the Supreme Court of Idaho recognized the true purpose of punitive damages as a deterrent and allowed children to request punitives in the suit for the wrongful death of their parents:

> "While an award of exemplary damages is a form of punishment, the primary purpose behind such an award is one of deterrence: 'the assessment of exemplary damages should be prompted by the court's or jury's desire to assure, to the extent possible via the imposition of a monetary penalty, that similar conduct does not occur in the future.'.....Thus, while a wrongdoer may be liable for punitive damages if he injures another, it is argued that punitive damages should nevertheless be withheld if a wrongdoer so injures another as to cause death. We find no logic in such a conclusion. If wrongful conduct is to be deterred by the award of punitive damages, that policy should not be thwarted because the wrongdoer succeeds in killing his victim. To hold otherwise would violate the precept that this Court should avoid a statutory interpretation which produces an absurd result. .....The nature and quality of the wrongful act should dictate whether its perpetrator should be compelled to respond in more than compensatory damages--not the fortuitous

circumstance whether he happens to injure or to kill his victim."
608 Pac. 2d at 864-865. (Emphasis added.)

The issue, then, is not whether the victim is dead or alive; the issue is whether the tortious conduct was intentional. If so, punitive damages must be allowed in order to deter future disasters. Only by removing financial incentive to intentional production of a death trap will this goal be accomplished.

CONCLUSION

With products on the market which literally explode with the force and effect of a time-bomb, there must be an effective deterrent to manufacturers who put these items on the market with actual knowledge of their dangerous characteristics. We as a society cannot say and must not say that it is cheaper to kill than to maim. To say this rejects the very concept of the sanctity of human life.

For these reasons, CTLA respectfully submits that the decision of the Court of Appeals must be reversed.

Respectfully submitted,

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